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Violations of Privacy and Law: The Case of Stalking¹

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ABSTRACT

This paper seeks to identify the distinctive moral wrong of stalking and argues that this wrong is serious enough to criminalize. We draw on psychological literature about stalking, distinguishing types of stalkers, their pathologies, and victims. The victimology is the basis for claims about what is wrong with stalking. Close attention to the experiences of victims often reveals an obsessive preoccupation with the stalker and what he will do next. The kind of harm this does is best understood in relation to the value of privacy and conventionally protected zones of privacy. We compare anti-stalking laws in different jurisdictions, claiming that they all fail in some way to capture the distinctive privacy violation that stalking involves. Further reflection on the seriousness of the invasion of privacy it represents suggests that it is a deeply *personal* wrong. Indeed, it is usually more serious than obtrusive surveillance by states, precisely because it is more personal. Where state surveillance genuinely is as intrusive as stalking, it tends to adopt the tactics of the stalker, imposing its presence on the activist victim at every turn. Power dynamics —whether rooted in the power of the state or the violence of a stalker —may exacerbate violations of privacy, but the wrong is distinct from violence, threats of violence and other aggression. Nor is stalking a simple expression of a difference in power between stalker and victim, such as a difference due to gender.

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Keywords: Stalking; privacy; ethics; criminalization; psychology; law

1. INTRODUCTION

Stalking consists of one person's keeping track of, and trying to make frequent contact with, another person, who is the subject of the first person's obsessive thoughts. The contact can take place in physical space or on the Internet. Although there are cases in which the object of obsessive thoughts is unaware of the attentions of the stalker, these are unusual and will be ignored in what follows. Some stalkers target high-profile political figures and think of their own behavior in patriotic or party political terms: these cases, too, will be disregarded. Also to be set aside are cases in which the context for the stalking is some pedagogical or clinical relationship which takes on sexual or romantic significance even if it involves no actual sex. We shall focus instead on what the psychological literature identifies as standard: cases where the basis of the stalking is some temporarily disrupted, defunct, or even imaginary romantic relationship between stalker and target.

Two questions will be considered in what follows. (1) What, if anything, makes stalking wrong? and (2) If stalking *is* wrong, is it so seriously wrong that it should be criminalized? Our answer to (2) is 'Yes', and the serious wrong involved can be summarized by saying that prolonged stalking often results in a sort of psychological take-over of its target.² The obsessive character of the stalker's pursuit can end up being reflected in an obsessive, anxious preoccupation with the "presence" of the stalker on the part of the victim, whether or not that presence is physical. This anxious preoccupation often pervades the stalking target's waking life, and undermines her capacity to deliberate, choose, and plan. This undermining is the harm that a properly formulated law against stalking should address.

The stalker imposes his presence typically by following the victim, by penetrating her home, and by disrupting her normal work and social relations. This presence is not always eliminated when the stalker is made the subject of a restraining order or put in prison. Victims of stalking suffer from anxiety, insomnia, greatly disrupted worklives, and loss of confidence. The effects of common or garden harassment can be similar, but they are often tied to a context—a workspace or a shared communal housing space—which does not pervade the victim's life, and which can be escaped or left. In stalking at its worst, the anxiety resulting from it is relatively *inescapable* and debilitating. It breaches most of a person's private space,

2 See Meloy (1998: ch.9), Mullen and Pathé (2002: 273-318, esp. 296ff)

including a person's inner sanctum: the space in which she deliberates and makes choices without external influences.

Because conventions governing private space, including the space to choose and deliberate without interference, are intimately connected with autonomy, it is hard to separate violations of privacy from attacks on autonomy. We emphasize violations of privacy, because, as it will emerge, we identify the psychological space for deliberation and choice as the most basic of three zones of privacy created by familiar informal conventions governing privacy. Moreover, we argue that in law, policy, and public discussion, the violation of privacy involved in stalking is incorrectly minimized, especially when compared to the intrusiveness of state surveillance. According to us, many forms of state surveillance are *less* invasive than stalking.

The rest of this paper is divided into five sections. In section 2, we draw on some of the psychological literature about stalking, distinguishing types of stalkers and their pathologies. We also discuss victims. It is the victimology of stalking that is the basis for claims about what is wrong with stalking and why it ought to be criminalized. Even when stalker and stalking victim are prior acquaintances who are not trying to revive or kindle romance, there is a thread running through the experiences of victims, and that is the obsessive preoccupation with the stalker and what he will do next. The kind of harm this does is best understood in relation to the value of privacy and conventionally protected zones of privacy (section 3). In section 4 we distinguish stalking from harassment in general and consider laws which fail to reflect the distinction between the two offenses. We compare anti-stalking laws in different jurisdictions, claiming that they all fail in some way to capture the distinctive privacy violation it involves. Section 5 considers the role of broader power dynamics and a feminist skepticism about the value of private spaces. Section 6 contrasts the invasiveness of stalking with the invasiveness of state surveillance.

2. STALKERS AND THEIR VICTIMS

It is rare to be stalked by a stranger.³ Most stalkers are men who are known to their typically female victims.⁴ Stalkers are often former sexual partners with whom the victim no longer wants a relationship, or else rejected

³ Though the UK government recently proposed new legislation in part addressing this kind of stalking <http://www.bbc.co.uk/news/uk-35010544>.

⁴ For an overview of typical offenders also see Baum (2009); and for an overview of both typical offenders and victims see Mullen (2009). The strongly gendered character of the typical stalking case is discussed in section 5 below.

suitors with whom at most non-sexual intimacy was achieved. These two kinds of stalkers, together with work-related colleagues, people met through professional relationships, and neighbors form the category commonly referred to as ‘prior acquaintance’ stalkers. In virtually all studies, whatever the recruitment method or sample size, ‘prior acquaintance’ stalkers account for the majority, sometimes close to 80 percent, of cases (Pathe and Mullen 2002: 289ff.).

Prior acquaintance stalkers can include ex-spouses who when living with the stalking victim were highly controlling and suspicious, and for whom stalking is a way of resuming that controlling role.⁵ These men might have been batterers of the women they once lived with and later stalked.⁶ Other stalkers are the non-battering former partners of stalking targets from whom they have been divorced.⁷ Still other stalkers are socially incompetent or isolated people who make frequent contact with the stalking victim as a form of communication of romantic feelings. Stalkers of this kind deludedly hope that frequent contact will make the stalking victim reciprocate these feelings. These stalkers do not necessarily strike the victim as frightening or a likely source of violence. Much more rare is the classic erotomaniac type, usually a woman, who suffers from the delusion that a higher-status man whom she has never met is in love with her.

Many stalkers—at least in the samples that have been associated with empirical studies in several countries—have criminal records and psychiatric histories, including histories of addiction to drugs and alcohol, but have better than average education (Hall 2007: 124-31). To the extent that they have been assessed psychologically, a significant number have experienced unwanted separation from parental figures or other adult providers of care or love in their early childhood (Meloy 2007: ch. 3). There is also a weak association between stalking and being a foreigner or cultural outsider.⁸

5 Indeed, Kurt (1995: 221) claims that “some stalking behavior represents a form of domestic violence”.

6 See, for example, Logan and Walker (2009) for an argument that stalking by partners is particularly likely to be particularly harmful and often begins while the relationship is still intact. It is also worth noting a study by Weller et al. (2012) indicating that both the public and police were less likely to regard scenarios involving stalking behavior by someone previously known to the victim as a case of stalking than they were when the same behavior was carried out by a stranger.

7 For an overview of sexual abuse—a category in which the authors include stalking—directed by women against men, see Cook and Hodo (2013)..

8 In one of the formative legal cases that inspired stalking legislation in the USA—*Tarasoff v. Regents of the University of California* (1976)—Prosenjit Poddar, a Bengali graduate student at Berkeley in the late 1960s, developed an obsessive attachment to a fellow student, Tania Tarasoff, who was probably the only American woman to befriend him while he pursued his studies in the USA. He misinterpreted some of her behavior as a sign of

The most severe stalking behavior—the most persistent, the most likely to involve violence, obtrusive following, surveillance at home, and frequent telephone contact—is associated with highly controlling ex-partners. Such stalkers sometimes seek to re-establish a cohabiting relationship, but they can also try to prevent the formation of new relationships by ex-partners. Where children are involved and they have visitation rights, stalkers of this kind often have a range of pretexts for maintaining contact with an unwilling ex-partner, and it is particularly difficult for the victim to extricate herself. Stalkers in this category often exhibit the symptoms of anti-social personality disorders (ASPD).⁹

Related personality disorders—borderline¹⁰ personality disorder, histrionic¹¹ and narcissistic¹² personality disorders—are also associated with violent stalking and may co-exist with or be confused with ASPD.¹³ In borderline personality disorder there are frequent changes of mood and threats of suicide as well as signs of paranoia. Again, “individuals create a sense of the importance or depth of the relationship that is not consistent with their partner’s attachment” (Meloy 2007: 74). This same delusion of depth is associated with histrionic personality disorder. “Individuals become uncomfortable if they are not the center of attention” and “often use their physical appearance, usually eroticized, to create attention” (ibid). As for narcissistic disorder, this is associated with a pathological need for admiration and is sometimes thought to run through the whole

romantic interest, and appeared not to be able to bear her eventual emphatic rejection of him. Although his obsession with Tarasoff was known not only to his friends but to clinical psychologists treating him, an attempt to talk to her alone at home ended in his stabbing her to death when she ran away. The claim that his relationship with Tarasoff was partly clouded by cultural misunderstanding and by the stresses of coping with American graduate studies is highly plausible (Meyers 1998).

9 See for example Meloy (2007: 73) who writes that these may include “failure to conform to social norms regarding behaviors, deceitfulness, lying, use of aliases, impulsivity, history of physical violence, reckless disregard for safety, irresponsibility and lack of remorse. ...Perpetrators present a false image of themselves regarding their life history, experiences and interest in the stalking victim. They have a unique sense of which women are vulnerable and prey on their weaknesses. Such female victims many times have a history of involvement with ASPD men. Domestic violence is a prominent theme during the relationship. When a break-up occurs, the stalker may attempt to intimidate the victim through telephonic and written threats, stalking and physical confrontation of their victims. Many times these individuals are violent toward their victims”.

10 “a pattern of instability in personal relationships, self-image, and affects, and marked impulsivity” (American Psychiatric Association 2013: 645,663-666)

11 “a pattern of excessive emotionality and attention seeking” (ibid 645, 667-669).

12 “a pattern of grandiosity, need for admiration, and lack of empathy” (ibid 645, 669-672).

13 “a pattern of disregard for, and violation of, the rights of others” (ibid 645, 659-663).

variety of stalker profiles (ibid).

Unlike some of the more serious psychiatric conditions,¹⁴ personality disorders do not necessarily rise to the threshold required for legal incompetence, and so stalkers suffering from them can be held responsible for what they do by courts and the police. Their behavior is also subject to moral assessment, since in many cases stalkers can form coherent (if malicious) intentions, reason about the consequences of their actions, be sensitive to the presence of witnesses, and can steer clear of legal borderlines they must not cross if they are to escape prosecution and imprisonment.

At the core of the moral wrong in prior acquaintance stalking is not assault or intimidation, serious as those wrongs are. It is the presumption of intimacy or the coercion of intimacy, if that latter notion is not self-contradictory. Intimate relations between two people involve willing companionship, including self-exposure on quite a large scale. This exposure proceeds on the assumption of more than trust: it usually involves mutual love. A false presumption of intimacy is a kind of pre-emption of the other person's exercise of will in self-exposure or in willing participation in intimate behavior, such as sex or sharing confidences that would be damaging if made public. The invasion is not necessarily greater when intimacy has never been entered into than when it has been entered into and then been withdrawn. For it may be a requirement of morally defensible romantic intimacy of any kind that, once it has been offered and reciprocated, either party can withdraw it at will. Such withdrawals are sometimes unreasonable, but they are always permitted; otherwise intimacy is forced and therefore defective. In ASPD cases the withdrawal of intimacy is very often *entirely* reasonable, prompted as it is by physical violence or psychological oppression. But even if it were not; even if one party suddenly found the other physically repulsive for no good reason; that would not make continued intimacy morally compulsory: intimacy is *never* morally compulsory.¹⁵ Care-giving might be; or continued co-operation in joint projects. But this might co-exist with a significant degree of withdrawal, sufficient for ending intimacy.

14 See for example American Psychiatric Association (2013).

15 See for example the argument of Andrei Marmor: "intimacy involves considerable costs, such as responsibilities and the need to care for the other. When those responsibilities and willingness to care are voluntarily undertaken, they foster good relationships. But when they are imposed involuntarily, especially on a large scale, the results might be quite oppressive. We can only operate in the complex societies we live in if we are allowed to deal with others at arm's length, keeping some distance. The need to keep some distance is partly physical—we often feel very uncomfortable being too close to strangers—but it is also, perhaps primarily, social; closeness to another typically involves expectations and responsibilities that one should, by and large, only undertake voluntarily" (Marmor 2015: 9).

For at least some, stalking is the attempt to regain lost intimacy, or an attempt to win a so far withheld intimacy, by a show of emotional intensity and persistence. In the eyes of the stalker this persistence and intensity *deserve* a positive, intimate response —*deserve* a declaration of love, say, or an invitation to cohabit, or a marriage proposal. When the persistence or intensity is met instead with a clear rejection, or with fear or confusion, the stalking can begin to be motivated by anger and start to aim at revenge for the pain of rejection. It is at this point that the prior acquaintance stalker often invades personal space —either physical, such as the subject's home, or psychological. Some stalkers invade this space in order to acquire the sort of proximity to the victim that real intimacy would have afforded, and that is mostly likely to help the stalker impress himself on the victim's consciousness. The stalker wishes to be the central object of the victim's romantic preoccupations but engineers, as a second best, a kind of top billing in her *anxious* preoccupations.

In a culture such as ours in which behavior that is traditionally expressive of deep intimacy, such as sex, can be part of very short-lived, casual relationships, the scope for confusion about what is serious or deep or genuine intimacy, or what can lead to genuine intimacy, is probably considerable. Presumably the 'intimacy' of the one-night stand is at some distance from fully-fledged intimacy, yet in some cases it may hold the promise of fully-fledged intimacy, or be interpreted that way, possibly incorrectly. By contrast, 'prior intimates' who have been married and started a family are in a morally different case from one-night stands. Although marriages involving parenthood are not *bound* to involve genuine intimacy, they can and usually do, even when they end in divorce or separation. And again, both marriage and one-time sexual involvement are different from prior acquaintance in its sexually unconsummated forms, where one of the parties has, or formerly had, romantic aspirations.

The moral distinctions between these cases track the genuineness and depth of intimacy, where a criterion of genuineness is whether the intimacy is willing and mutual and relatively sustained. The deeper the genuine intimacy once achieved, the less presumptuous, other things being equal, is the attempt to *regain* it non-violently or non-oppressively. The divorced person who does nothing more than send an annual love letter to his ex-partner for more than 30 years does not count as a stalker, but his behavior probably belongs on a spectrum that includes stalking.¹⁶

¹⁶ Curiously, a deep invasion of physical and psychological space can occur in cases of stalking that are not obviously romantically inspired. Here the wrongness can seem as great or greater, violence apart, than in cases so far considered, since romantic intimacy is never offered, and so never withdrawn, by the victim. The stalking victim starts out by being professionally related to the stalker, and the supposed departure from that relationship by

3. STALKING AS A VIOLATION OF PRIVACY

Is there anything that ties together the invasiveness of the whole range of stalking behavior? The short answer is that all stalking involves persistent invasions of privacy. The successful stalker goes beyond simple invasions of privacy to mount a kind of *occupation* of the mind. This kind of intrusion is more significant than any other kind of incursion into this or any other zone of privacy, whether by perfunctory or even moderately prolonged uninvited observation.¹⁷

We now enlarge briefly on zones of privacy and the relations between them. We think there are at least three such zones. The first two include the naked human body and the home space, that is, the physical space —often a room or set of rooms or a building —which provides a customary default location for a given agent, and where others are permitted only at the agent's invitation. The home space in our sense —in the sense of default location of an agent to which he or she controls access —is more austere conceived than home space in the sense of the site of traditional marital or family relations.¹⁸

Familiar and very widely observed conventions restrict public displays —displays outside the home space —of the nude human body, or of sex. Further conventions restrict the observation or surveillance by outsiders of activities in the home space. Surveillance that violates the home space can be motivated by the wish to exploit the connection between the privacy

the stalking victim is often largely or wholly a figment of the stalker's imagination. Two well-documented cases start in student-teacher relationships. The first involves an academic, Robert Fine, who was physically stalked by an ex-student (see Fine 1997). The other is a much more recent, possibly still on-going, case of cyberstalking, also involving an ex-student and the poet and novelist James Lasdun (see Lasdun 2013). Both cases depart from the standard pattern of a woman stalked by a man previously known to them, but they reproduce the severe psychological disturbance that stalking seems to bring with it.

¹⁷ While privacy may be invaded without constituting an act of stalking, all stalking behavior involves an invasion of privacy. Historically the privacy literature can be divided between that concerned with physical intrusions, informational privacy, and that concerned with the conditions of autonomous life. For example Allen (1998) distinguishes privacy in the sense of “restricted access” —something like our zonal account —and decisional privacy; Tavani (2007) argues for a “restricted access/limited control” position, latching together a “restricted access” account and a limited control component for the specific case of informational privacy. The literature most directly relevant to our purposes here is that on physical intrusion. However, we think the case of stalking helps to demonstrate the relevance of physical intrusion to understanding wider considerations, especially that of autonomy.

¹⁸ The austere conception of the home is supposed to be distinct from the problematized domestic space —outside the reach of law in classical liberal formulations —that is supposed to be one of the loci for the exertion of male or patriarchal power. To exclude issues that are not relevant to our account of the field of application of the right to privacy, we can imagine the home space having only a single occupant at a time.

zones of body and home. In the home, the normal conventions prohibiting the display of the body are relaxed. This means that surveillance of home space can give an outsider intimate access to the body of the person or persons whose home it is. Surveillance can produce a facsimile of physical presence. But since the conventions governing the home space require presence to be by invitation, the ‘presence’ afforded by surveillance, especially covert surveillance, is a significant violation of privacy.

The normative protections afforded to home spaces can travel with the individual to temporary homes like hotel rooms, or, more weakly, when travelling around particular kinds of public space. Consider a couple eating dinner together in a restaurant. It is understood that they may be seen by others there or spotted through a window, but any kind of prolonged watching will be invasive. Contact here might require some sort of negotiation—even a friend who spotted them might engage in at least non verbal communication to make sure their contact was not unwanted before approaching their table. We might call a table in a restaurant a ‘semi public space’. Again, consider the norms governing watching or contacting an individual sitting in a parked car, relaxing in a public park, or reading in their seat on an airplane. Even in the most undeniably public of spaces—the concourse of a railway station or a public square—there might still be normative presumptions against prolonged watching or uninvited contact, albeit ones more easily trumped by other considerations. In this way, repeated uninvited contact or hovering could amount to intrusion even if it occurred in what was otherwise a public—non-home—space.¹⁹

Mere presence or observation in someone else’s zone of privacy does not necessarily mean that that person has been wronged. After all, we often voluntarily *grant* access to others. Nevertheless, one may experience a loss of privacy even in these cases. The loss may be outweighed, e.g., by the benefits of (genuine, uncoerced) intimacy, or for more mundane reasons. The homeowner who asks a repairman to come round and fix their fridge gives up some privacy for a while. In a range of other cases potentially deep costs to privacy are mitigated by the fact that someone is acting in a professional role and has no personal interest in the information they gain access to. I may be less embarrassed by a repairman seeing how messy my kitchen is than by my neighbor’s seeing the same thing: I will probably never see the repairman again. Our contact is at the outer fringes

¹⁹ Normative protections of the naked body and of mental privacy arguably also ‘travel’ with the individual. If someone’s body is unwillingly exposed as the result of an accident it will be common to look away, to respect their privacy. Except in specific circumstances it will be regarded as (mildly) invasive to check what someone is reading over their shoulder even if they are in a public space.

of personal.²⁰ With the neighbor it is different.

We have been speaking of conventional restrictions on exposure of the body and outsider presence in the home space. A third, less obvious, zone of normative privacy is the mind. In a way this is the most sensitive of private zones, normatively speaking, since it is the space from which one chooses what the limits of willing self-exposure will be in relation to the body and also who else can be present in the home and how. More generally, the mind is the space from which everyday activity is considered and planned. It is also the space in which at times one *discovers* what one thinks, sometimes by ‘trying on’ opinions experimentally and attempting to defend them in conversation. In other words, mental space may be the staging area for the expression and controlled exposure to criticism of one’s opinions—in a space that is only open to others by invitation. Here the home and mental spaces work together.²¹

Incursions into mental space can take the form of unwanted indoctrination or overbearing parenting, but they can also take the form of harassment and stalking. Incursions can be sporadic or sustained. When they are sustained and debilitating, in the sense of reducing the capacity of an agent for deliberation and choice, they are particularly serious, because of the way that deliberation and choice control exposure in the other privacy zones.

Prior-acquaintance stalkers have often had unrestricted access to all three of the privacy-sensitive zones on our list: they have been romantically involved with their stalking victims and have sometimes lived together and started a family with them. They have also gained information about what they think and what matters to them. This access is often what they are trying to regain by stalking. The same access is what stalkers exploit when they are trying to increase the anxiety of their victims. But the prime

20 Two intermediate cases are contact with doctors involving physical examination and (less common) being subject to the attentions of a private investigator, and becoming aware of it. In the doctor case, we grant (typically brief) access to a private zone for diagnostic or curative purposes, which purposes limit the degree to which it is personal. This is quite different from stalking. In the investigator case there is usually access to publicly available information about someone, rather than to the body or home. Where a private investigator carries out the investigation obtrusively and persistently over a long period of time, and stoops to wire-tapping or housebreaking, the distance from stalking shrinks. We thank anonymous Referee 2 for getting us to think about these cases and the case at N21.

21 If a fellow traveller’s conversation on the bus is so racy and provocative that I cannot tune it out, has my mental privacy been invaded? In most circumstances no: the bus is understood as a shared space where overhearing conversations is to be expected. Furthermore, the conversers are unlikely to have any intention of imposing their conversation on others. However, in unusual circumstances an inappropriate conversation could be an invasive action: consider a stalker who deliberately sits near their victim and deliberately begins a conversation that they know the victim will be unable to tune out.

and overarching effect of stalking —often the intended effect —is to unsettle and preoccupy the mental space of the stalking victim, to such a degree that the stalker is always present to the stalking victim's mind. In this way they have often therefore also penetrated the normative protections of the home space as well.

The psychological harm produced by stalking brings out the importance of privacy in general, and the priority of protections for the mental zone among the range of zones of privacy. The reason why privacy matters in general is that it facilitates the autonomous pursuit of life-plans. Someone with no privacy is likely to be subject to interference from others, sometimes through the excessive influence of close associates, whether friends, family, or employers.

Privacy can counteract excessive influence. It obstructs coercion by removing people from the coercers, enabling unobstructed choice and activity to proceed. It allows an agent to think, plan and act away from even well-meaning friends and family. Again, privacy makes possible safe inactivity or rest. Differently, it makes possible safe engagement in otherwise risky social activity. It makes possible willing disclosure to a very limited audience, or even all-out concealment of things from everyone else. It provides opportunities not only for non-exposure, but also, when the private space is under the agent's control, for safely exposing oneself to, and thinking about, new ideas and influences, and for undergoing new experiences.

Through the opportunities it affords, privacy can enlarge the range of options an agent chooses between. It can also make available information about the experiences of those who have already made choices that one is considering. Not that the opportunities provided by privacy have to lead to uncharacteristic behavior: they can instead lead to reflections that confirm one in past choices. But by making available new grounds for endorsement of even characteristic choices, privacy makes characteristic choices more autonomous, at least in principle.

Against the background of the value of privacy, it is possible to understand the pre-eminence of the mental zone within the range of zones conventionally protected from unlimited observation and from intrusion. The mental zone is the locus for reasoning, critical reflection, and deliberation leading to decision. It probably contains the determinants of the continuity and identity of the self and possibly the person.²² For this reason it might be considered an inner sanctum. If this zone is violated by the forced introduction of preoccupations, then the value of the privacy of the home is also diminished, since the home space acts to create a barrier

22 See for example Locke (1975) and Williams (1973).

of protection for the mind in addition to an agent's power of non-disclosure and concealment. If the mental space is anxiously preoccupied, its value as the locus for reasoning, critical reflection, and deliberation is diminished. In its diminished condition it can become a source of vulnerability which insulation within the home may even increase. If mental vulnerability is prolonged in time, as often occurs in stalking cases, the harm caused is proportionally greater. Mental vulnerability can in turn increase bodily vulnerability and the vulnerability of the home space. In other words, violations of the mental zone can rob the other privacy-sensitive zones of value, but not necessarily conversely.

4. STALKING , HARASSMENT AND LAW

What is the difference between the psychological invasiveness of stalking and the psychological invasiveness of harassment? There are similarities and overlaps between harassment and stalking, but distinguishing them helps to explain why stalking is usually a more severe violation of privacy and, with that, a more severe violation of autonomy, than harassment.

Typically, harassment is repeated, one-sided *aggressive* contact. As defined in English law,²³ the contact must cause distress or fear of violence to constitute an offense. It regularly occurs between a victim and *more* than one perpetrator, unlike typical stalking, or is directed by one or more people or by several perpetrators acting together.²⁴ Harassment may be a *hate* crime in which the perpetrators take out their racism or sexism on strangers who are representative of hated groups, but who are not known personally, or it may take place in the context of an employment relationship or between different residents in a neighborhood. Compared to the kind of stalking that appears to be central —namely one-on-one prior-acquaintance stalking with romantic associations—harassment seems to be more intended to frighten or exclude, and more open to collective rather than individual responsibility. Admittedly, some harassment can be sexual and can take some of the forms that stalking does. But harassers are often keen to drive their victims away, or to remind them through frequent contact of an imbalance of power in their favor in a neighborhood or workplace. There is often in the background a threat of violence if the victim does not behave in a certain way.

What is missing in many cases of harassment but present in nearly all cases of stalking is the wish on the part of the harassers to be permanently

23 http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a02a

24 Sometimes in stalking cases additional people will assist the stalker —see for example Fine (1997) —but this is exceptional.

present to their victims. The neighborhood harassers make themselves felt when the victim is in the neighborhood; the workplace harasser when the victim comes to work, and so on. They are not omnipresent, and often they do not want to be. By the same token, ordinary harassment can often be escaped, at least temporarily, by distracting the mind or by retreat into the home. A person who is regularly subjected to verbal abuse can sometimes escape it by restricting their hearing of the abuse, say by drowning it out with music heard through headphones. The victim of harassment can sometimes change location, or in the extreme case, their address. Stalking, by contrast leaves the victim nowhere to retreat to, even if the perpetrator can be reported.²⁵

The more *inescapable* the harassment, the more it is obsessively before the victim's mind, the more it has in common in its effects with stalking. But the former intimacy of many stalkers with their victims, and their quite common lack of aggression, create bigger and better opportunities for psychological take-over than are open to common or garden harassers. Perhaps the victim's home space was once shared with the stalker, and is associated psychologically by the victim with the stalker, so that it is not quite the retreat that it might be from ordinary harassment. Perhaps the stalker's relatively comprehensive knowledge of the victim's habits and movements, and the victim's awareness of that comprehensive knowledge, combine to produce the impression that the stalker is always close at hand. In short the relative inescapability of the stalker's presence, explained by former intimacy, distinguishes stalking from even quite similar forms of harassment.

In framing what are now the oldest and most influential stalking laws, legislators have misidentified the core wrong of stalking by linking it to the threat of violence.²⁶ This may fit many forms of harassment as we are characterizing it, but not the central forms of stalking. The first legislation to criminalize stalking was passed in California in response to a series of high profile murders committed by stalkers. The current legislation in the Californian Penal Code 646.9 runs as follows:

(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking.

²⁵ Indeed, one line of criticism of stalking criminal justice is that it has offered too many opportunities for perpetrators to revictimize the stalked. See for example Pathe et al. (2004).

²⁶ See for example Meloy (2002: 105): "the crime was codified to prevent acts of violence that were, in retrospect, sadly predictable".

The focus on physical safety in the originally drafted legislation, which required “a credible threat of death or great bodily injury” (Meloy 2007: ch. 2, 28), has subsequently been weakened, but it still treats the offense as one of threatening physical safety.²⁷ California law has remained a model for other American state jurisdictions, and up to now legislation in a number of other US states requires a credible threat to safety for an act of stalking to have taken place (Royakkers 2000: 8-9). Furthermore, in 1992, the National Institute for Justice, under the direction of the Congress, issued a ‘model stalking code’: this code specifies that it is conduct causing ‘reasonable fear of bodily harm’ that counts as stalking.²⁸

We acknowledge that stalking cases involving the threat of violence are in some way more urgent morally than cases where victims suffer only incessant but non-violent contact. Does it follow that the actions of non-violent stalkers should not be criminalized? In our view, the answer is ‘No’: It is invasion of psychological space and psychological takeover that ought to be treated as the core wrong. The threat of violence aggravates rather than constitutes the core wrong. To address the core wrong we need a new category of non-violent harm, or a widening of the scope of violence to include something like psychological violence, where psychological takeover is sufficient for psychological violence.

These alternative approaches are up to a point reflected in UK legislation and case law. To come first to legislation, the UK’s first attempt at criminalization was the 1997 Protection from Harassment Act.²⁹ It does not define harassment,³⁰ instead relying on an understanding of ‘what a

27 See for example Guy (1993: 1010) or Zimmerman (2000: 233): “the ultimate harm that legislatures are trying to protect victims from is not the stalking conduct itself, but is instead the murder, rape or battery that the stalking conduct could ultimately produce”. Both Guy and Zimmerman identify dangers to constitutional liberties in the criminalization of stalking (see also Purcell et al. 2004). Identifying the wrong involved with stalking conduct itself as opposed to violence helps to mitigate though not eliminate some of these worries. Such worries are also mitigated by our assessment of the severity of stalking, independent of any relation to violence. From an early stage advocates of stalking laws have argued that the liberties curtailed by anti-stalking laws are outweighed by the harm considerations: “Overall, the government’s interest in protecting its citizens from harm outweighs the defendant’s right to notice and extensive procedures in the short term. Therefore these procedures for ex parte restraining orders should not raise constitutional concerns” (Walker (1993: 301). We differ only in widening the harms relevant to this argument.

28 See for example Tjaden (2009).

29 We criticize the Protection from Harassment Act for misidentifying the criminalizable core of the act of stalking, but for criticism of its effectiveness and implementation see Petch (2002).

30 The Director of Public Prosecutions’ latest guidance explains it “can include repeated attempts to impose unwanted communications and contact upon a victim in a manner that could be expected to cause distress or fear in any reasonable person” —see

reasonable person would consider harassment’, and it further requires that the offender know that what they are doing would be so considered. ‘Harassment’ refers to a much wider category of activities than stalking some of which —like journalistic persistence —might not merit criminalization at all.³¹ Although we agree that harassment is often a criminalizable wrong, it seems a lesser wrong than stalking.

The second alternative to the American approach —widening the scope of the harm of violence —can be seen in interpretations of the categories of assault and battery in UK law. ‘Assault’ refers to the apprehension of violence, while battery refers to the actual infliction or causation of harm. Both assault and battery may inflict either actual bodily harm (ABH) or grievous bodily harm (GBH). Actual bodily harm is an injury that is more than ‘transient’ or ‘trifling’, while to count as grievous bodily harm an injury must be one a jury would consider ‘really serious’. Courts have concluded that both ABH and GBH can include entirely mental harms (Herring 2009: 62-64), but these have to amount to medically recognized psychological conditions. For example, in the case of the more serious category of GBH, Herring offers the example of post-traumatic stress disorder (Herring 2009: 62-64). This may raise the bar too high for cases of stalking where there is no one identifiable traumatic event.³²

Legislation introduced in the Scottish Parliament in 2010 was the first in the UK to name and specify the offense of stalking. The relevant part of the legislation reads as follows:

- (1) A person (“A”) commits an offence, to be known as the offence of stalking, where A stalks another person (“B”).
- (2) For the purposes of subsection (1), A stalks B where
 - (a) A engages in a course of conduct,
 - (b) subsection (3) or (4) applies, and

http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a02a. One important case in shaping legal understanding was *Plavelil v Director of Public Prosecutions* [2014] EWHC 736 in which the defendant had brought a series of distressing accusations through the courts which he knew to be untrue — the court found that this could amount to harassment.

³¹ A point made by Robert Fine, whose case formed an important basis for the Protection from Harassment Act (Fine 1997: 158-9).

³² “The difficulties associated with establishing the existence and extent of psychological harm may prove to be an impediment to conviction. The need to establish a causal link between the defendant’s conduct and the psychological harm suffered by the victim may prove to be a particular barrier to conviction in the absence of a guilty plea. Moreover, the quantification of the extent of psychological harm is insufficiently precise to enable subsequent prosecutions to be brought in cases where the stalker is undeterred by his conviction” (Finch 2002b).

LEAP 4 (2016)

- (c) A's course of conduct causes B to suffer fear or alarm.
- (3) This subsection applies where A engages in the course of conduct with the intention of causing B to suffer fear or alarm.
- (4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm.

This improves on the 1997 Protection from Harassment Act by recognizing stalking as a distinctive offense, rather than stalking-as-harassment. But it locates the wrong of stalking in causing 'fear and alarm', and this seems not to capture the wrong in cases of prior acquaintance stalking where no violence is threatened or feared.³³

In England and Wales, the 2012 Protection of Freedoms Act was introduced to update the 1997 Protection from Harassment Act. Like the Scottish legislation, this names stalking as an offense and gives a (non exhaustive) list of behaviors that could count. On the other hand, it retains some of the focus on violence of the 1997 Act. Offenses where the threat of violence is absent can be given prison sentences of no more than 6 months. The alternative of recognizing non-violent harms can again be seen in the new Section 4(A) offense of stalking involving violence or serious alarm or distress, carrying a maximum sentence of up to 5 years in prison. While this retains something of the idea of stalking as most serious when it is a violent offense, in the spirit of the current paper it recognizes 'serious alarm or distress' as a kind of serious harm. Below we shall consider whether serious alarm or distress ought to be built in to the definition of stalking itself. Here it suffices to point out that such an approach coheres with our view of what stalking is.

Legislation in the Netherlands and Germany distinguishes the wrong of stalking from harassment. However, Dutch and German legislators misidentify the core wrong involved. They frame stalking not only as an offense involving mental harms but also as one that involves manipulation or coercion of the victim. The Dutch legislation describes the offense as "the willful, unlawful, systematic violation of a person's private life with the intention of forcing someone to do, not to do, or to tolerate something or to frighten him or her".³⁴ Relatedly, German legislation identifies stalking offenses by listing a series of stalking (and cyberstalking) behaviors

³³ As in the *Fine* and *Lasdun* cases discussed at N16.

³⁴ (Royakkers 2000: 12). Furthermore, the mental nature of the offense is further underlined in a "companion explanatory memorandum [which] makes it clear that stalking is viewed as psychical assault with malice aforethought against the physical and psychical integrity of the victim" (Royakkers 2000: 12).

directed against a victim “thereby seriously infringing their lifestyle”.³⁵ We think ‘lifestyle’ misnames what is infringed. ‘Private life’, the term used in the Dutch legislation, is more suggestive and is open to amplification along the lines of this paper. Nevertheless, both the Dutch and German approaches seem to go wrong in requiring stalking to belong to a manipulative or coercive agenda whereas some stalkers may be more concerned with imposing their presence than with getting the victims to do or omit something.

We argue that stalking laws ought to be reformed to reflect better the core wrong of stalking, which is a certain deep violation of privacy. But this claim immediately meets an objection: namely, that while stalking surely ought to be and has been criminalized, there is no need for the criminalization to be geared too precisely to the *core* wrong that stalking involves.³⁶ Here there is a useful parallel with the case of rape. Jurisprudents have disagreed over the core wrong of rape, but legislation or prosecutorial activity has not had to take sides in the controversy. Imagine a case where a woman who is unconscious is penetrated without consent and never finds out what has happened. In such a case sex occurs without consent but does not register with the victim at all, and therefore is not associated with experienced pain or distress. Could this count as a case of ‘harmless rape’, as some writers put it (Gardner and Shute 2000)? It is plausible that there is an interest in sexual integrity that is widely or universally distributed among human beings: this is clearly set back—which constitutes harm—even in the supposedly harmless rape case (see for example Archard 2007). On this account, the wrong of rape consists of the fact that unconsented-to sex—even where it is not experienced—sets back an interest in sexual integrity.

35 Whosoever unlawfully stalks a person by

1. seeking his proximity,
2. trying to establish contact with him by means of telecommunications or other means of communication or through third persons,
3. abusing his personal data for the purpose of ordering goods or services for him or causing third persons to make contact with him,
4. threatening him or a person close to him with loss of life or limb, damage to health or deprivation of freedom, or
5. committing similar acts and thereby seriously infringes his lifestyle shall be liable to imprisonment not exceeding three years or a fine.

(2) The penalty shall be three months to five years if the offender places the victim, a relative of or another person close to the victim in danger of death or serious injury.

(3) If the offender causes the death of the victim, a relative of or another person close to the victim the penalty shall be imprisonment from one to ten years.

(4) Cases under subsection (1) above may only be prosecuted upon request unless the prosecuting authority considers *proprio motu* that prosecution is required because of special public interest.

http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1935

36 Victor Tadros called our attention to this point.

Analogously, one can say that an interest is set back where someone goes through all the motions of obsessive following but the person followed never notices —say because they are very preoccupied themselves with something else. In such a case there might still be an interest that is set back —e.g., an interest in having mental space for forming plans free of attempts at encroachment. If making repeated efforts to colonize this space is the core wrong of stalking, however, the law may have to confine itself in practice to cases where the efforts to colonize *do* take effect. This would correspond to the fact that unnoticed rape is bound to lie below the prosecutorial radar.³⁷

Our view suggests that the *actus reus* of stalking consists in persistent attempts of unwanted following or contact, where this causes distress that we categorize as psychological take-over. This stands in contradiction to stalking legislation that specifies threats or fear of violence. On our account the *mens rea* of stalking could be characterized as seeking persistent contact where a reasonable person would know it was likely to cause distress.

Although the core *wrong* involved in stalking is, according to us, a privacy violation, our account of privacy connects the value of privacy to autonomy. Stalking characteristically produces impaired autonomy by means of psychological take-over. But our account is consistent with saying that the harm that justifies the criminalization of stalking is the impaired autonomy it produces, rather than core wrong of encroaching on a fundamental zone of privacy.

Stalking is a serious crime because it involves a *debilitating* invasion of

³⁷ Furthermore, one can imagine cases where it would be difficult to determine whether stalking had taken place without knowing how the contact had affected the victim. Contact —even persistent contact —isn't inevitably psychologically harmful, or even distressing. Some will be able to shrug off persistent contact and some won't. The intention of an individual engaged in persistent pursuit provides another reason to stop short of pressing the analogy with rape too closely. Pursuing contact with an individual isn't inherently wrong —it's a basic part of everyday social interaction. The boundary between legitimate pursuit of contact and stalking will depend (among other things) on how the victim responds. Psychological harm may set the bar too high, though distress, broadly enough conceived, seems more reasonable. Unaware targets of stalking have been discussed specifically in relation to efforts to capture cyberstalking, with critics of existing legislation pointing out that important categories of cyberstalking behavior —interfering with the victim's computer, and carrying out 'surveillance' —are not covered by the law because these behaviors often are carried out without the intention that the target will be aware of them —see for example MacEwan (2012) for this criticism, though he goes on to note: "there is other law available in such circumstances. Where, for example, the stalker hacks into the victim's email this would be an offence under Computer Misuse Act 1990 (CMA) s.1.108 It would also be an illegal interception of a message under Regulation of Investigatory Powers Act 2000 (RIPA) s.1. Crucially though, neither the CMA nor RIPA enables the imposition of restraining orders".

private space, an invasion that goes deep into private space because of the pre-eminence of the mind—as seat of deliberation and choice—among the zones of privacy.³⁸ Debilitation through occupation is the more characteristic attack on autonomy carried out by stalkers. This form of wrongdoing seems integral to stalking, regardless of any external, coercive force—personal, physical violence—that might also be inflicted. It is natural to regard the invasion as a privacy violation in the deep sense that it penetrates the space of emotion, attention, choice, deliberation, confidence, and self-image tied to a minimal form of self-respect. Stalking is more than a violation of the precincts of the home, and the threat posed to it by stalking is crucial to understanding what is distinctively wrong with stalking.

5. GENDER AND POWER

Stalking is deeply personal and, according to us, what is wrong with it cannot satisfyingly be understood merely as the assertion of power against the relatively powerless. Very often stalking seems to arise from a will to connect rather than, or in addition to, a will to dominate,³⁹ and this will seems to belong to a person rather than a power structure—e.g., a patriarchal power structure—personified. Though stalking wears down and often permanently disables its victims psychologically, it is not always the behavior of stereotypically powerful people and institutions, and it is not always conducted with the goal of damaging or attacking the victim.

On the contrary, stalkers can be isolated social incompetents who want to establish a romantic relationship with someone, and go about it in a particularly clumsy or deranged way. Even forms of stalking that grow out of highly controlling domestic abuse can be described by the stalkers themselves as a means of regaining a life of affection with a family or a partner. This description detaches stalking from broader power dynamics which may also be at work. According to us, stalking does not only have a politics, concerned with the imbalances of power between men and women discussed in feminist writing, but also an ethics, connected with the value of having a personal space and personal plans outside the control

38 For a recent study of some of the typical psychological harms suffered by women see Diette et al. (2013).

39 See for example Spitzberg and Cupach (2001: 350): “The stalker is engaged in a campaign of messages to persuade an object of affection to cast a vote in the pursuer’s direction. Even clinical approaches have defined stalking as a process of communication (e.g. Mullen et al., 2000). The stalk becomes a chess game of move and countermove, all directed toward establishing or re-establishing a relationship to suit the stalker’s conception, even if at times that relationship is one of enemyship rather than friendship or romance”.

or access of others. Our account is not in the least a denial of patriarchy or of its relevance to stalking. It is the suggestion that there is something further to be said. In this section we consider two possible feminist objections to our approach.

The first objection arises from a critique of the value of privacy. There is a strong tradition of feminist skepticism about privacy (see for example DeCew 1997: ch 5). For example, feminist skeptics point out that the commonly recognized privacy of the home has often served to obscure violence and other abusive treatment of women in domestic settings. Take this classic statement from Catharine MacKinnon:

“It is probably not coincidence that the very things feminism regards as central to the subjection of women —the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate—form the core of what is covered by privacy doctrine. From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape and women’s exploited labor; has preserved the central institutions whereby women are *deprived* of identity, autonomy, control and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced” (MacKinnon 1987: 101).⁴⁰

But the moral defensibility of norms of privacy is at least as much debated within feminist thought as it is between feminists and others. We think our approach coheres well with the approaches of (primarily liberal) feminists, such as Anita Allen (1988 and 2011), Annabelle Lever (2011), and Judith DeCew (1997 and 2015), who take norms of privacy to be deeply important to gender equality.

The many reasons a feminist might value privacy would surely include protection against unwanted contact from men—and not only protection from violence. Privacy normatively excludes unwanted presence. We think our account explains why this is so. Furthermore, our account of privacy allows that norms of privacy are criticizable. We don’t defend all norms of privacy—only those that on balance are justifiable. The feminist critique has its greatest force against a set of safeguards different from the ones we wish to prioritize, that is, those protecting a set of practices—within marriage, child-rearing, and the maintenance of a household. We agree with Annabelle Lever when she says that

40 For another classic statement of this argument see MacKinnon (1983).

“...while MacKinnon is right that legal protections of privacy have often had these effects, it is less clear that this makes privacy inherently, and irremediably, sexist, as she implies. On the contrary, many feminists have been moved by Virginia Woolf’s claim, in *A Room of One’s Own*, that women’s lack of privacy has been a major obstacle to their development and self-expression and a potent sign of their second-class status. So, one could think that MacKinnon is largely right about way that established philosophical and legal views of privacy have disadvantaged women compared to men—in part, by denying them privacy within their marital and sexual relationships—without supposing that this is unalterable or an escapable feature of claims to privacy” (Lever 2012: 22-3).

The zones recognized by our discussion of privacy are both more abstract and less connected with a traditional public/private distinction than those of marriage, family, and household, which we think correspond closer to the target of the feminist anti-privacy critique. The body, the home, and the mind, as we have characterized them, are not essentially seats of patriarchal power. Indeed, DeCew (2015) distinguishes an alternative feminist position that redraws rather than collapses the public/private distinction:

“On this alternative interpretation, rejecting the public/private divide by collapsing the private side onto the public is neither the feminist point nor an implication of the feminist position...the boundaries between public and private need to be redrawn. [Adherents of this alternative] would not jettison privacy but recognize that what happens in the family is not beyond scrutiny. An alternative understanding of the feminist critique of privacy, therefore, is that feminists merely want to reject the public/private distinction *as it has been understood in the past*, from Aristotle on. These feminists are emphasizing that the state must stop ignoring the unbelievable abuses that have been protected in the name of privacy; this is, they believe, a position that is not captured by the public/private position as it has been known and used in pre-feminist times and theories” (DeCew 2015: 92-93).

There is a second potential feminist objection to our approach which does not lean on a denial of the value of privacy. Feminists might object to the attempt to detach the core wrong of stalking from violence, as it obscures the fact that stalking is usually a crime carried out by men against

women, and that there is something violent about patriarchal power. We reply that distinguishing the different wrongs involved in stalking—partly by violations of different zones of privacy—produces a clearer and more accurate picture of what stalking is. It also clarifies how power dynamics—including those rooted in gender—play a role. It is not to deny that some of the power dynamics are strongly gendered.

There is indeed clear consensus that most perpetrators of stalking are male and most victims female, though no consensus on what best explains the disparity (Lyndon et al 2012; Davis et al. 2012; Langhinrichsen-Rohling 2012). In the most violent kinds of stalking behavior (including those involving physical threats) it is overwhelmingly men who are the perpetrators and women who are the victims. One explanation offered is the background power dynamics enabling men and disadvantaging women in day-to-day life. The argument is that this facilitates men's stalking behavior and simultaneously makes such behavior less likely on the part of women:

“When one takes account of the differentials in resources typically available to men, such as greater physical strength, socially sanctioned power, and control of wealth, it becomes clearer why women will more often be victims of coercive control while in relationships, and persistent pursuit when attempting to leave abusive relationships” (Davis et al. 2012: 337).

It is probably correct to say that entrenched male power facilitates some abusive behaviors connected with stalking, however maladroit and socially ineffective many male stalkers may be. However, if stalking does not necessarily involve violence, the gender difference between stalkers and stalked may be less marked. Davis et al. (2012) restrict stalking to

“the willful, malicious, and repeated following and harassing of another person that threatens his or her safety” (Davis et al. 2012: 329)—in other words defining stalking as involving some possibility of violence. ‘Persistent pursuit’ is used to refer to “‘ongoing and unwanted pursuit of romantic relationships between individuals [who are either] not currently involved with each other’ or who have broken up with each other” (Davis et al. 2012: 329).

We take a wider conception of stalking that would include persistent pursuit, denying the claim that behavior has to threaten safety, or even cause fear to qualify.

Davis et al. (2012) conclude that if one focuses on the wider set of stalking behaviors, the profiles of perpetrators and victims are less distinct

in gender terms. Furthermore, they argue that studies may fail to include methods of pursuit more likely to be carried out by women, suggesting that the picture may be more equal still. Women, they maintain, are as likely as men to engage in the least serious forms of persistent pursuit such as “following, showing up uninvited, and persistent telephoning, texting, and emailing: The difference is that when women persistently pursue, they don’t have the backing of a broad, well-established cultural system that supports the cultural norm of a woman persistently and aggressively seeking a relationship” (Davis et al. 2012: 332).

We have argued that a description of the core wrong of stalking does not need to refer to power dynamics. However, the core wrong of stalking can of course be exacerbated by power differentials to which gender may well be pertinent. Laws criminalize behaviors, not people. Stalking cannot be regarded as a lesser offense just because it is carried out by a woman rather than a man. However, our view allows that following behavior could be much more threatening when carried out by a man against a woman. The law can widen its narrow focus on violence while distinguishing pursuit that is merely unwanted or annoying from pursuit that is debilitating.

6. STATE SURVEILLANCE

The ethics of respecting and protecting privacy is most often discussed in relation to state surveillance, not stalking. We previously claimed that the privacy violation of stalking could be worse than violations of the human right to privacy associated with state surveillance. We shall now substantiate this claim.

As articulated by the International covenant on Civil and Political Rights (ICCPR), Article 17,⁴¹ and the associated Human Rights Committee General Comment 16,⁴² the human right to privacy is a protection against surveillance of one’s home, monitoring of correspondence, and attacks on one’s reputation. Civil and political rights anticipate the whole range or arbitrary and excessive uses of power by states against their own citizens, especially politically active citizens. The right to privacy fits into that scheme: it affords a protected setting not only for conjugal and family life, but for thought and discussion, including thought and discussion that is critical of government and other powerful organizations. The home can also be a site for meeting a wide group of friends who may have, among

41 <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

42 <http://www1.umn.edu/humanrts/gencomm/hrcom16.htm>

other things in common, a shared political or religious outlook. The home is thus a key site for the exercise of freedom of thought and association.

Human rights theory and practice focus primarily on abuses of state power or failures of states to channel resources where there is most need. They tend not to take account of disputes between individuals or small-scale abuses of power where they fall short of assault. It is true that Article 17 recognizes violations of privacy by natural persons; still, nosey neighbors, voyeurs, or spouses concerned with infidelity probably lie well outside its main ambit. Its focus is on arbitrary *official* intrusion and disruption, disproportionate police surveillance, disproportionate data retention, and defamation. Encroachments on parental rights to determine the education and religion of their children and even the size of their families are also included. In all of these cases it is against the state that privacy needs defending.

Since a large proportion of the literature on the ethics of privacy and the wrongness of intrusion has been focused on state surveillance, it is natural to question our claim that stalking attacks privacy and autonomy more directly than paradigm cases of state surveillance. We readily concede that, in extreme cases, state surveillance *can* threaten the psychological preconditions of autonomy. Sufficiently extreme cases—we outline some below—can be conceived, and some real world cases can be pointed to as well. Nevertheless, there are good reasons to consider such cases unrepresentative of state surveillance in practice.

In considering what the state does, it is routine to distinguish between mass and targeted surveillance. Examples of mass surveillance include CCTV and the Internet monitoring system revealed in *the Guardian* in 2013 and commonly referred to as PRISM. Mass systems attempt to capture information on anyone within a particular area, or carrying out a particular activity. The actual scrutiny involved in mass surveillance tends to be slight, however, because attention must be divided between many different targets. The limits to the degree of individual scrutiny in mass surveillance also restrict how intrusive one can consider the surveillance in question.⁴³

Targeted surveillance is a different matter. By definition it involves intense scrutiny of individuals. Again, targeted surveillance may involve

43 Intrusiveness is of course also a function of the kind of information involved—most would consider the NSA Internet monitoring system more intrusive than CCTV in a public place, even though the likelihood that any particular person's communications are monitored is low. From our point of view it is not the intrusiveness but the indiscriminatingness and the disproportionate scale of the surveillance that is objectionable.

penetration of spaces like the target's home or car, which are far more protected by law from surveillance than public parks or squares. Furthermore, targeted surveillance involves concentrated attention and scrutiny from a number of people. The targeted monitoring of an individual's movements throughout public space, by the deployment of a surveillance team, say, will be much more intrusive than a CCTV viewer who notices the same individual as one of many people in the area.

Surveillance techniques can and have been used for repression, for example by the Stasi in East Germany after 1960.⁴⁴ Some of the techniques of the Stasi are similar to techniques used in contemporary serious crime investigations in liberal jurisdictions. They involve placement of bugs or human intelligence to gain access to the target in private places or tracking the movement and behavior of the target throughout their daily lives. The reach of the Stasi was enormous, with intelligence files on close to a third of the population by the time the Berlin Wall came down. These files were compiled with the willing help of many thousands of informers engaging in surveillance of their neighbors and acquaintances. Stasi targets were not restricted to credible suspects of serious crime; they included anybody who disagreed with the regime, or who was even merely suspected of doing so. The system of surveillance was also sometimes used as a tool to settle private scores that had nothing to do with politics. The Stasi was interested not simply in gathering intelligence but also in intimidating dissidents, smearing their character, and organizing 'professional failures'. Invasions of privacy, then, were used directly for repression, by making it clear to the target that they were being watched, or that they were targets of smears or coercion. For example, the activist with 'Women for Peace', Ulrike Poppe, was not only watched often and subjected to ongoing state scrutiny and detention: she was arrested 14 times between 1974 and 1989; and she was subjected to *obvious* surveillance, surveillance she could not help but notice, such as men following her as she walked down the street, driving six feet behind her.⁴⁵ In a case like this, it might be apt to talk about Stasi agents successfully achieving psychological takeover of the target; dominating their thoughts to the point that a normal autonomous life is impossible.

44 For histories of the Stasi state see for example Childs and Popplewell (1996) and Koehler (2008).

45 See for example Willis (2013). Furthermore, after reunification, when it became possible to read the file the Stasi were maintaining on her, she was to discover not only further surveillance she was not aware of (such as the camera installed across the road to record everyone coming to or from her home) but also the existence of plans to 'destroy' her by discrediting her reputation

—<http://www.dw.germans-remember-20-years-access-to-stasi-archives/a-15640053>

Stasi tactics provide the closest analogy between the intrusiveness of state surveillance and stalking. But reflection on this analogy exposes its limitations. First, the extremism of Stasi tactics is untypical of state surveillance in general. Most surveillance—even in illiberal states—is impersonal and much less pervasive, so that a person has something of a life behind closed doors and can have a full and unpreoccupied mind quite a lot of the time. Stasi surveillance is even untypical of surveillance in authoritarian regimes, as much successful repression can be achieved by the more modest means of simply disincentivizing political activity—raising the costs so high that very few will engage in it. This ‘chilling effect’ is often mentioned among the politically important costs of state surveillance policy, often in the course of a more general argument to the effect that modern surveillance unacceptably erodes the private sphere. However, ‘chill’, as distinct from psychological takeover, cannot erode the private sphere completely. For the disincentivization of political activity to be successful there must be a relatively roomy private life that the discouraged activist can retreat into. This means that it can be counterproductive for surveillance in the most repressive states to amount to autonomy-undermining psychological takeover. This can do more than discourage political activity: it can take away *sanity* when nothing so extreme is required for rendering people apolitical. Stalking does more than disable activist inclinations; it undercuts the conditions for even the apolitical, personal autonomy that activist and non-activist lives alike presuppose.

So while there ought to be a greater focus on violation of privacy in analyses of stalking, privacy is over-emphasized in much public debate about state surveillance. This is not to dismiss moral objections to the rise in surveillance of the last 15 years, largely a consequence of the September the 11th attacks. To judge much contemporary surveillance to be less invasive than stalking is not to endorse it. Much stalking flows from abusive relationships in which men are the abusers or from a refusal, overwhelmingly on the part of males, to accept rejected romantic overtures. It could be that a will to dominate that pervades many unreformed male-female interactions partly explains stalking, and is irreducibly political.⁴⁶ But this would not fully explain the personal harm involved in stalking, nor hence why stalking should be criminalized. The abusive husband does not just represent his gender and arguably gender-based will to dominate through stalking. Nor does his target merely represent ‘womankind’. He acts in his own right—as a person—and his stalking is a serious crime committed against a unique individual.

46 We thank Anonymous referee No. 2 for this point.

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